**EXPLANATORY STATEMENT**

**Issued by the authority of the Secretary for Health and Aged Care**

***Aged Care (Transitional Provisions) Act 1997***

*Aged Care (Transitional Provisions) (Residential Care Subsidy) Amendment (Residential Aged Care Funding) Determination 2022*

The *Aged Care Act 1997* (Aged Care Act), the *Aged Care (Transitional Provisions) Act 1997* (Transitional Provisions Act) and the *Aged Care Quality and Safety Commission Act 2018* (ACQSC Act) provide for the regulation and funding of approved providers of aged care services, including in respect of continuing care recipients (that is, persons who entered an aged care service before 1 July 2014 and meet certain other criteria). Persons who are approved under the ACQSC Act to provide aged care services (approved providers) can be eligible to receive subsidy including supplement payments under the Transitional Provisions Act in respect of the care they provide to continuing care recipients.

**Purpose**

The *Aged Care (Transitional Provisions) (Residential Care Subsidy) Amendment (Residential Aged Care Funding) Determination 2022* (the Amending Determination) amends the *Aged Care (Transitional Provisions) (Residential Care Subsidy) Determination 2014* (thePrincipal Determination) made by the Secretary under the Transitional Provisions Act.

These amendments are consequential to amendments made in Schedule 1 to the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* (Royal Commission Response Act) and Schedule 2 to the *Aged Care Legislation Amendment (Residential Aged Care Funding) Instrument 2022* (Amending Instrument).

The Amending Determination is a legislative instrument for the purposes of the *Legislation Act 2003.*

**Authority**

Section 44-5B of the Transitional Provisions Act sets out the meaning of a supported resident. As part of the definition, paragraph 44-5B(1)(c) allows the Secretary to determine, by legislative instrument, an amount against which the value of a person’s assets is assessed.

Section 44-29 of the Transitional Provisions Act deals with the viability supplement, and in particular, subsection 44-29(2) provides that the Secretary may make a determination by legislative instrument in respect of a residential care service for the purpose of working out the amount of the viability supplement under subsection 44‑29(1). The viability supplement is repealed by Schedule 1 to the Royal Commission Response Act, which commences on 1 October 2022, but was still in effect at the making of the Amending Determination.

**Reliance on subsection 33(3) of the *Acts Interpretation Act 1901***

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

**Commencement**

The Amending Determination commences on 1 October 2022.

**Consultation**

The aged care sector and the general public have been consulted extensively between 2017 and 2020 on the development of the new Australian National Aged Care Classification (AN-ACC) residential aged care funding model arrangements and related measures, of which the Amending Determination is a part. The AN-ACC funding model and the new arrangements are consistent with Recommendation 120 (Casemix-adjusted activity‑based funding in residential aged care) of the Final Report of the Royal Commission into Aged Care Quality and Safety, tabled on 1 March 2021.

**Regulation Impact Statement (RIS)**

The Office of Best Practice Regulation (OBPR) was consulted during development of the Royal Commission Response Act on the regulatory costs of implementing the new funding arrangements that these Amending Principles will further enable. OBPR advised that a RIS was not required (OBPR ID 25927). The certification and list of reviews are available on the Office of Best Practice Regulation’s website: <https://obpr.pmc.gov.au/published-impact-analyses-and-reports/aged-care-reforms>.

**ATTACHMENT**

***Details of the*** ***Aged Care (Transitional Provisions) Residential Care Subsidy) Amendment (Residential Aged Care Funding) Determination 2022***

**Section 1** states that the name of the instrument is the *Aged Care (Transitional Provisions) (Residential Care Subsidy) Amendment (Residential Aged Care Funding) Determination 2022.*

**Section 2** states that the whole instrument commences on 1 October 2022. This coincides with the commencement of amendments in Schedule 1 to the Royal Commission Response Act.

**Section 3** provides that the authority for the making of the instrument is the Transitional Provisions Act.

**Section 4** provides that each instrument that is specified in a Schedule to the Amending Determination is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms.

**Schedule 1 – Amendments**

***Aged Care (Transitional Provisions) (Residential Care Subsidy) Determination 2014***

**Item 1 – Section 3**

This item omits a reference in section 3 of the Principal Determination to subsection 44-29(2) of the Transitional Provisions Act. This is because section 44-29 of the Transitional Provisions Act will be repealed on 1 October 2022 by item 77 of Schedule 1 to the Royal Commission Response Act.

**Item 2 – Sections 5 and 6**

This item repeals sections 5 and 6 of the Principal Determination and substitutes a new section 5 – “Amount of asset threshold for supported residents”.

Section 6 dealt with the Secretary’s determination of the viability supplement in relation to eligible residential care services under subsection 44-29(2) of the Transitional Provisions Act. This section is repealed as a consequential amendment to amendments made by item 77 of Schedule 1 to the Royal Commission Response Act, which repeals the viability supplement.

New section 5 is made for the purposes of paragraph 44-5B(1)(c) of the Transitional Provisions Act and specifies that the amount of the asset threshold for supported residents is worked out using the following formula:



***applicable amount*** means the applicable amount for the day for the person within the meaning of section 82 of the *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014*.

***lower asset threshold*** means the amount worked out by rounding to the nearest $500 (rounding up in the case of $250 or more) the amount equal to 2.5 times the basic age pension amount (within the meaning of the Transitional Provisions Act) at the time that applies under section 43 of the *Aged Care (Transitional Provisions) Principles 2014* in relation to the person.

These amendments aim to clarify the provision by removing existing subsection 5(1) of the Principal Determination and amending the definition of lower asset threshold. The amendments to the definition of applicable amount are otherwise consequential to amendments made in Schedule 2 to the Amending Instrument to ensure that the basis for calculating the amount of the asset threshold for supported residents on a day will remain the same on and after 1 October 2022.

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Humans Rights (Parliamentary Scrutiny) Act 2011*

*Aged Care (Transitional Provisions) Residential Care Subsidy) Amendment (Residential Aged Care Funding) Determination 2022*

The *Aged Care (Transitional Provisions) Residential Care Subsidy) Amendment (Residential Aged Care Funding) Determination 2022* is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny Act) Act 2011*.

**Overview of the legislative instrument**

The *Aged Care (Transitional Provisions) (Residential Care Subsidy) Amendment (Residential Aged Care Funding) Determination 2022* (the Amending Determination) amends the *Aged Care (Transitional Provisions) (Residential Care Subsidy) Determination 2014* (thePrincipal Determination) made by the Secretary under the Transitional Provisions Act.

These amendments are consequential to amendments made under the Transitional Provisions Act in Schedule 1 to the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* and Schedule 2 to the *Aged Care Legislation Amendment (Residential Aged Care Funding) Instrument 2022*.

**Human rights implications**

The Amending Determination engages the right to an adequate standard of living and the right to health in as contained in article 11 and article 12 of the *International Covenant on Economic, Social and Cultural Rights*, and article 25 and 28 of the *Convention on the Rights of Persons with Disabilities*.

The Amending Determination promotes the right to health by providing for matters related to the subsidised provision of aged care accommodation and services on the basis of need. The subsidisation of aged care services will ensure care recipients are able to access health facilities and goods through their approved provider, including essential medications and other health services.

The Amending Determination promotes the right of those receiving care to an adequate standard of living by providing for the subsidised provision of aged care accommodation and services on the basis of need. This includes ensuring higher subsidies are paid in respect of the costs of aged care accommodation for those with less assets and or lower incomes.

**Conclusion**

The Amending Determination is compatible with human rights as it positively promotes the human right to an adequate standard of living, and to attain the highest standard of physical and mental health.

**Professor Brendan Murphy AC**

**Secretary Department of Health and Aged Care**